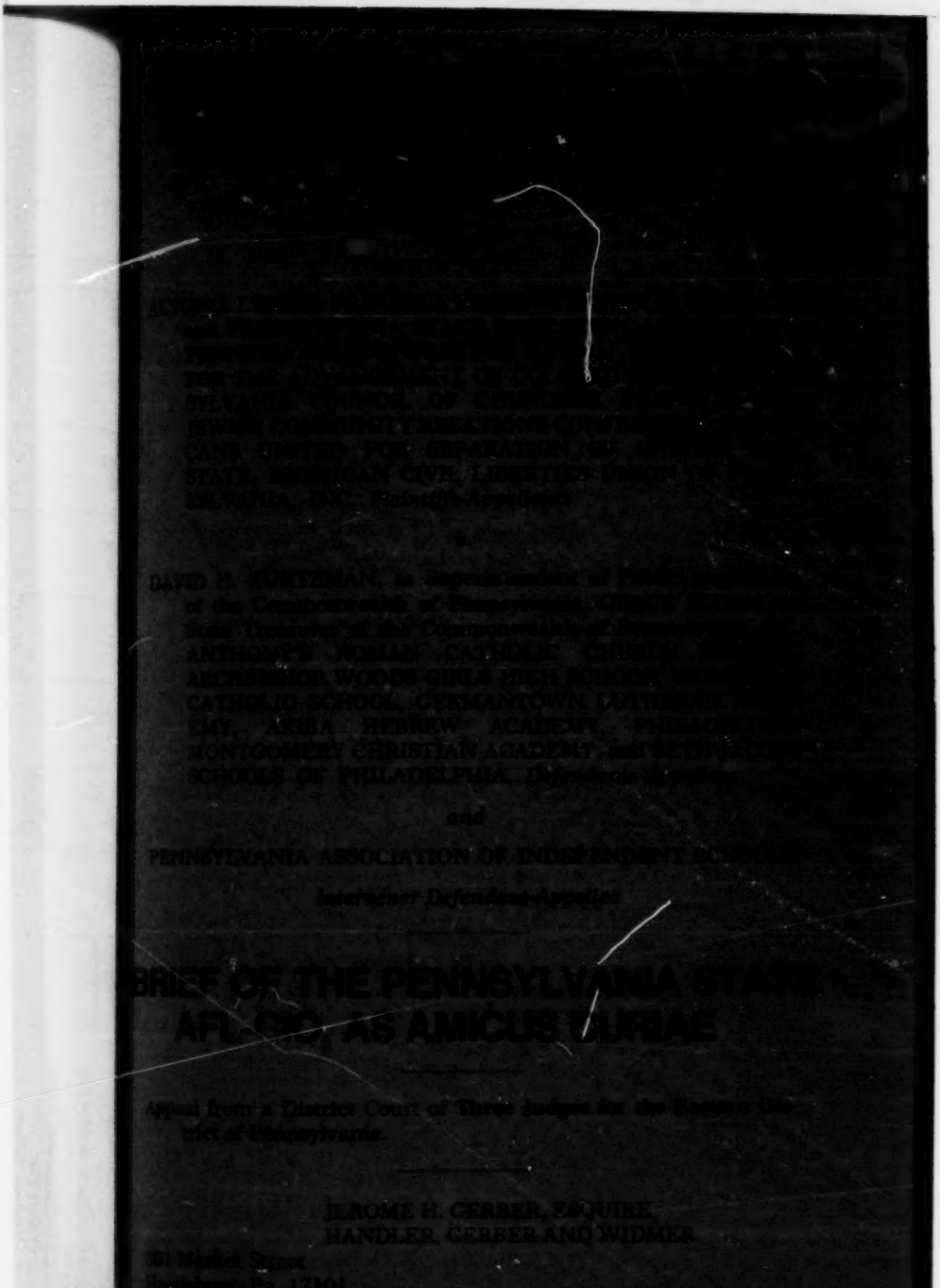

IN THE

Supreme Court of the United States

October Term, 1970

No. 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC. *Plaintiffs-Appellants*

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA, *Defendants-Appellees*

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervener Defendant-Appellee

The Pennsylvania State AFL-CIO is a federated labor organization to which are affiliated over 2400 national and local labor unions operating in the Commonwealth of Pennsylvania which in turn represent more than a million working men and women.

The Pennsylvania State AFL-CIO is deeply devoted to the concept of the separation of Church and State. However, this organization has acknowledged that in providing

essential services for the citizenry of the Commonwealth, young and old alike, it is often necessary for the State to utilize the facilities of non-public or church organized institutions.

In the past the Federal and State Governments in an effort to fully utilize all available facilities have cooperated with non-public and religious schools, hospitals, homes for the aged and other institutions through Medicare, Social Security, the GI Bill of Rights, the Academic Facilities Construction Act, the National Defense Act, the Anti-Poverty Act and numerous other legislative enactments. In each case the primary objective has been to furnish a service of the Government to its citizens without regard to the denominational or non-denominational character of the institution which is best able to provide that service. The Pennsylvania State AFL-CIO believes that it would be inconsistent, on one hand, to demand compulsory education in accordance with prescribed standards while, on the other hand, to deny financial support for school age children whose parents elect to have them receive their secular education in a religiously affiliated school.

The Legislature of Pennsylvania in enacting the Pennsylvania Nonpublic Elementary and Secondary Education Act, the Act of June 19, 1968, P. L. ———, No. 109, 24 PS 5602, et seq, has recognized that instruction in the form of mathematics, modern foreign languages, science and physical education are purely secular in nature and the teaching of these subjects is fully the responsibility of the State and the community regardless of where such courses are conducted. The Legislature, therefore, deemed it both pertinent and advisable for the State to purchase such services from private schools in which the children of this State are educated. The reimbursement to private institutions for these limited purposes is a proper and non-prohibited utilization of tax monies. Such expenditures fall within the same broad category as the utilization of tax revenues for the providing of fire and police protection for these same institutions or the provision for dental and

physical examination of the students who attend these institutions, the aid to nutrition and transportation of all children regardless of the character of the school which they attend.

The Court below upheld the validity of the Pennsylvania Act in question in the face of attacks upon it based upon the religious clauses of the First Amendment.

Chief Circuit Judge Hastie in his dissenting opinion predicts that by sustaining the Act under consideration here, the way would be opened for similar payments to sectarian hospitals, community centers and homes for the aged and infirm. In reality, where such payments constitute the meeting of the State's obligation under a purchase of service contract, Pennsylvania has approved such a concept since 1956.

In *Schade v. Allegheny County Institution District*, 386 Pa. 507, 126 A. 2d 911 (1956), a suit was brought to enjoin the Institution District from paying tax revenues to sectarian institutions or homes for board, care and maintenance of neglected children on order of the Juvenile Court. At that time, Article III, Section 18 of the Pennsylvania Constitution forbade the appropriation of State funds by the Legislature to any denominational or sectarian institution. The Supreme Court of Pennsylvania concluded that the payments did not constitute appropriations of State funds. The Court stated:

> "The cost of maintenance of neglected children either by the State or the County is neither a charity or a benevolence, but a governmental duty. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors. The services had been rendered before partial payment on account of same was received. A considerable part of this money is recouped by the Juvenile Court from the parents of the minor wards. The balance of the funds so expended are, in legal effect, *payments to the child—not the institution supporting and main-*

taining him or her. [See *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 374-375, 50 S. Ct. 335, 74 L. Ed. 913]***.

"The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor paying just debts to them when incurred at its direction or with its approval. Numerous cases can readily be visualized where such situations have occurred: i.e. payment of the bill of an injured employee to a sectarian hospital." 386 Pa. 512. (Emphasis added).

There is a clear analogy between the action of the State Agency in *Schade*, and the action complained of in the instant case. So also is the holding of the *Schade* case applicable to our facts. To paraphrase *Schade* — the cost of teaching science, mathematics, modern language and physical education to school age children is neither a charity nor a benevolence, but a governmental duty. The moneys received by private schools are in partial reimbursement for the sectarian education of such children. The services are rendered before the payment is made. The money thus expended is, in legal effect, a payment to the children, not to the school.

The Pennsylvania Supreme Court in the *Schade* case also considered and rejected an attack upon the legislation there in question based upon the Fourteenth Amendment to the United States Constitution, relying principally upon the decision of this Honorable Court in *Everson v. The Board of Education*, 330 U.S. 1, 15 (1947).

Following the *Schade* decision and based upon it the Attorney General of Pennsylvania ruled that it would be proper to make direct payments of public assistance monies to sectarian or denominational nursing homes. 1957 Pa. Op. Atty. Gen. 24, Formal Opinion No. 686, dated April 22, 1957. Shortly thereafter the Attorney General, again relying upon *Schade*, ruled that it was proper for the State Council for the Blind to make payments to sectarian in-

stitutions for medical treatment of blind persons and for tuition of blind and visually handicapped persons. 1958 Pa. Op. Atty. Gen. 272, Official Opinion No. 132, dated July 9, 1958.

In 1959, the Pennsylvania Legislature gave the State Department of Public Welfare broad powers to purchase services for individuals entitled to them. Administrative Code of 1929, Section 2329, added December 21, 1959, P. L. 1944 §8, 71 Purdon's Statutes §611.9. Later, in 1963, Pennsylvania abandoned its traditional concept of direct appropriations to non-sectarian hospitals to offset the costs of free patient care, a concept which denied State funds to denominational hospitals, and instituted a purchase-of-care program. Under this program, hospital bills of the medically indigent were partially paid for by the State without regard to the religious affiliation of the hospital. Public Assistance Law, Section 9, added August 13, 1963, P. L. 777, repealed and substantially re-enacted in the Public Welfare Code, the Act of June 13, 1967, P. L. ——, No. 21, 62 Purdon's Statutes §101, *et seq.*

In 1965, the General Assembly of Pennsylvania amended the Public School Code to provide for free transportation of students attending nonpublic, nonprofit schools. Act of June 15, 1965, P. L. 133 §1, 24 Purdon's Statutes (pocket parts) §13-1361. The validity of the provision was upheld by the Supreme Court of Pennsylvania in *Rhoades v. School District of Abington Township*, 424 Pa. 202 (1967), certiorari denied 389 U.S. 846, appeal dismissed 389 U.S. 11. The Supreme Court of Pennsylvania relied primarily upon this Honorable Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), and viewed its ruling as a logical extension of its earlier decision in *Schade*, supra.

Finally, nine days after this Honorable Court upheld the New York Statute requiring school districts to lend text books to students attending parochial schools, *Board of Education v. Allen*, 392 U.S. 236 (1968), the General Assembly of Pennsylvania enacted the Pennsylvania

Nonpublic Elementary and Secondary Education Act, the law under attack in this appeal.

We can thus see that over the past sixteen years, commencing with the *Schade* case, there has been an expansion of public services to the people of Pennsylvania. In the past, governmental services were denied to a class of persons who elected to obtain their care or education in a denominational institution, while at the same time, others, equally deserving government assistance, received it because they resorted to non-denominational institutions. Slowly this distinction has been and is being erased in Pennsylvania as elsewhere.

The prediction of gloom which Chief Circuit Judge Hastie has made in his dissenting opinion below that this case will prompt an expansion of similar payments in non-educational areas, overlooks the facts that for years such practices have existed and have been recognized. Payments to hospitals, nursing homes and related entities have been the forerunners upon which Pennsylvania has now built a program of educational assistance.

In every case, however, the State's assistance has been directed to the patient or the pupil and not the institution.

The law here under attack grants no special privilege to students attending private schools. Indeed, such students still receive far less State and local assistance than do their counterparts in public schools. Nevertheless, a step has been made to erase the total disparity that previously existed between such students and has enhanced the educational opportunities and standards of all the school children of the Commonwealth.

The Pennsylvania State AFL-CIO has long recognized the financial crises in the public schools and it views with equal concern the tremendous financial burden sustained by the parents of students attending private institutions of learning. The suggestion that students now attending non-public schools should seek instruction on the premises of public educational institutions would create such an additional burden on the public elementary and secondary

schools as to make this proposed solution a virtual impossibility. The Act here under consideration can well assist the Commonwealth in its efforts to avoid such a confrontation.

For the foregoing reasons, the Pennsylvania State AFL-CIO respectfully requests that the decision of the Court below be affirmed.

Respectfully submitted,

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BY / JEROME H. GERBER, ESQUIRE